

DEPARTMENT OF HEALTH AND MENTAL HYGIENE  
BOARD OF HEALTH

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NOTICE OF ADOPTION OF AMENDMENTS TO SECTIONS 11.01 AND 11.55 OF THE  
NEW YORK CITY HEALTH CODE

In compliance with Section 1043(b) of the New York City Charter ("Charter"), a Notice of Intention to amend Sections 11.01 and 11.55 of the New York City Health Code and Notice of Public Hearing was printed in The City Record on March 28, 2003. A public hearing was held on April 28, 2003. The Department of Health and Mental Hygiene ("Department") has made clarifying changes to the resolution approved by the Board of Health ("Board") for publication and comment on March 20, 2003.

STATUTORY AUTHORITY

These amendments to the New York City Health Code ("Health Code") are promulgated pursuant to Sections 556, 558, and 1043 of the Charter. Section 556 of the Charter grants the Department jurisdiction to regulate all matters affecting health in the City of New York. Section 556(c)(2) authorizes the Department to supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health. Sections 558(b) and (c) of the Charter empower the Board to amend the Health Code and to include in the Health Code all matters to which the Department's authority extends. Section 1043 of the Charter grants the Department rulemaking powers.

STATEMENT OF BASIS AND PURPOSE

In light of the tragic events of September 11, 2001, this country, and New York City in particular, has been at a heightened state of alert. Since September 11th, there has been an increasing concern that terrorists or nations hostile to the United States might intentionally release smallpox virus or other contagious microorganisms. In light of this concern the federal government for example, has established by federal law and regulations enhanced control of dangerous biological agents and toxins. [See 42 U.S.C. Section 262a and 42 C.F.R. Part 73].

In order for the Department to improve its ability to effectively control and contain potential catastrophic disease epidemics due to contagious microorganisms such as smallpox, there was a need to strengthen the Health Code provisions that address detention of patients with certain suspected or confirmed contagious diseases, as well as their potential contacts. For example, as laboratory confirmation for these diseases may take several hours or days, it is essential that these provisions clearly apply to not only suspect cases but, also to their potential contacts during the time period after the suspect case is first identified and evaluated, while awaiting the test results.

Smallpox is of great concern because 1) the virus is infectious via aerosol exposure; 2) it is rapidly transmissible from person to person; 3) worldwide immunity to the virus has waned; 4) it causes an illness with severe morbidity and mortality; and 5) it has the potential to cause outbreaks that could easily overwhelm the medical care and public health sectors. The ability to

control a smallpox outbreak will depend on rapid isolation of suspect and confirmed cases, and the immediate identification and vaccination of their contacts.

However, smallpox is not the only contagious disease that can cause potentially catastrophic epidemics with an immediate threat to public health. A pneumonic plague outbreak also would require immediate isolation of suspected or confirmed cases and, in some circumstances, contacts of those cases. Moreover, today there also is a concern about the emergence of new diseases or the threat that a microbial pathogen could be bioengineered to be more rapidly transmissible from person to person and/or cause a more severe disease. Further, new molecular biology techniques may be used to alter naturally occurring organisms into even more virulent pathogens. For example, state-sponsored bioweapons programs could develop plague strains that were resistant to normally effective antibiotics, or novel viruses could be created that combined the typical mortality of Ebola infection with a highly communicable respiratory virus (e.g., influenza). A bioengineered virus like this would result in a public health emergency of enormous proportions, requiring rapid and effective public health responses in order to contain and control it. For certain diseases, there may be no effective treatment or preventive measures, so that isolation and detention of cases and contacts may be the only public health measures available to control the outbreak.

The Health Code amendments set forth herein (i.e., amendments to Sections 11.01 and 11.55 of the Health Code) enable the Department to take some of the necessary steps to face the imminent and severe threats to the public's health that would occur if smallpox or other highly contagious disease outbreaks, whether natural or intentional, occurred in New York City.

A suspected or confirmed smallpox outbreak will be used here to illustrate the rationale underlying these amendments to Section 11.55. However, it should be noted that the causes of infectious disease outbreaks, especially those resulting from previously unknown organisms, are not immediately determined after clusters of apparently related illnesses are first recognized. For example, West Nile virus was not identified immediately as the cause of the unusual 1999 encephalitis outbreak in New York City. If an unknown infectious disease outbreak occurred and it appeared to be contagious, (e.g., contacts of suspect cases were becoming ill with similar symptoms) and resulted in severe morbidity and/or mortality, then conservative infection control measures would need to be implemented. These might include detention of individuals who have been or may have been exposed to suspected or confirmed cases until the cause of the illness was determined and appropriate preventive and treatment measures could be implemented, or until the case and/or contacts were deemed no longer infectious or potentially infectious.

It is important to realize that section 11.55 of the Health Code, prior to these amendments, authorized the detention of cases, contacts and carriers, as well as suspected cases, suspected contacts and suspected carriers who are endangering public health. Furthermore, the definition of "case" in the Health Code includes both a diagnosed instance of a reportable disease, as well as a person showing clinical signs of a reportable disease, but who may not yet be diagnosed as such (i.e., a likely or suspected case). Accordingly, a contact of a case includes a contact of an unconfirmed case. Similarly, a suspected contact of an unconfirmed case was, and will continue to be, within the ambit of section 11.55. The prior version of section 11.55 of the Health Code authorized the detention of these individuals only if there was a determination

that the health of others “is” endangered. In situations such as the one described above, when it may be prudent to detain even those who may have been exposed to a catastrophic disease, it would be impossible to say that a particular individual “is” a present danger, at least until the medical situation was better determined. Therefore, the Department amended the Health Code to clarify that individuals who “may be” a danger can be detained. This particular class of individual would be a contact of a suspected case and would have to be released in accordance with the provisions of subdivision (c) (4).

## **I. DETECTION OF AND RESPONSE TO A SMALLPOX OUTBREAK:**

Historically, smallpox was a disease that often was introduced to an area by one person, and then resulted in successively increasing waves of additional cases, as each person transmitted the disease to their close contacts. The second wave would then generate an even larger third wave, and so forth. To contain and control a smallpox outbreak, it was critical to identify as many of the patients in each wave as quickly as possible through active surveillance, and to promptly vaccinate each case’s household, workplace, and social contacts, followed by the vaccination of the contacts’ contacts (ring vaccination). If public health authorities achieved this successfully, the outbreak would be brought under control.

The Department has provided all acute care facilities in NYC with guidelines for the management of suspected smallpox patients in their facilities. They have been directed to establish effective triage procedures so that patients with fever and a rash (i.e., with signs of possible smallpox infection) would be identified promptly and placed rapidly in an appropriate isolation room. These maneuvers would minimize the likelihood that contagious patients would transmit their infections to patients, visitors, or hospital personnel.

Clinicians also have been asked to use a diagnostic algorithm developed by the federal Centers for Disease Control and Prevention (CDC) for evaluation of patients with suspected smallpox infection. Patients would be considered low, moderate, or high risk suspected smallpox patients, depending upon a distinct set of clinical criteria. All moderate and high risk patients would be evaluated immediately by Department medical personnel, who would collect clinical specimens and arrange for immediate transport to the CDC. Between 24 and 72 hours might be needed for the CDC to conduct the initial tests and report the results to the Department. During that time period, contacts of the suspect case might need to be detained, in order to ensure that they could be located and vaccinated if the suspect case was found to be infected with smallpox. In addition, if the case was confirmed, contacts who were not vaccinated would have to continue to be detained until they were determined not to be a potential danger to others. Such measures would be necessary in order to contain an outbreak of a devastating disease in its early stages.

## **II. RESPONSES TO OTHER COMMUNICABLE DISEASE WHICH MAY BE DISSEMINATED OR TRANSMITTED FROM PERSON TO PERSON, AND MAY POSE AN IMMINENT AND SIGNIFICANT THREAT TO THE PUBLIC HEALTH RESULTING IN SEVERE MORBIDITY OR HIGH MORTALITY:**

The public health response needed to contain potentially catastrophic outbreaks caused

by other contagious pathogens would depend upon the nature of the organism involved. For example, if a strain of smallpox was used that was not prevented by the current vaccine, then isolation and detention could be the only control measure available to public health authorities. An antibiotic-resistant strain of pneumonic plague also would require rapid isolation and detention of all known or suspect cases and contacts, until a reliable antibiotic strategy could be identified and implemented to treat infected patients and to prevent infection in their contacts. Otherwise, the outbreak might continue to spread from person to person, resulting in higher mortality and significant social disruption, if not unrest. Finally, if New York City was attacked with a novel virus with which physicians and medical researchers had no prior experience, public health again would need to rely upon isolation and possibly detention to control the outbreak, pending characterization of the virus and elucidation of treatment and preventive measures that could prove effective in those infected and exposed, respectively.

The Department's authority with regard to the protection of public health is extremely broad. For example, Section 3.01(c) of the Health Code states that, "Subject to the provisions of this Code or other applicable law, the Department may take such action as may become necessary to assure the maintenance of public health, the prevention of disease, or the safety of the City and its residents." Also, Section 11.03(b) of the Health Code provides that, "The Department shall conduct such investigation as may be necessary to ascertain sources or causes of infection, to discover contacts and unreported cases, and shall take such steps as may be necessary to prevent morbidity and mortality." The prior version of Section 11.55 of the Health Code authorized the detention of individuals upon a determination that the health of others "is" endangered by such individuals. In the example of smallpox described above, it would be necessary to detain individuals who are not currently infectious, but who certainly would present a danger to others if the suspect case were to be confirmed. Therefore, the Department amended section 11.55 to include authority to detain when the health of others is "or may be" endangered by a contact of a suspected case. The Department also amended the definition of non-household contact in paragraph (i) of Section 11.01 to clarify that it includes an individual who may have been in close association with a case or carrier.

Mindful that the prior version of Section 11.55 of the Health Code authorized detention with regard to any communicable disease, the Department amended section 11.55 so as to authorize detention only with regard to smallpox, pneumonic plague, or any other communicable disease that, in the opinion of the Commissioner, may be disseminated or transmitted from person to person, and may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality. It should be noted that the Department will not treat HIV/AIDS as a communicable disease triggering this section. A decade ago there were attempts by medical organizations to compel the NYS Health Commissioner and State Public Health Council to add HIV infection to the list of communicable and sexually transmissible diseases. NYS refused to take such action and New York's highest court, the Court of Appeals, affirmed that decision. New York State Society of Surgeons, v. Axelrod, 77 N.Y. 2d 677, 572 N.E.2d 605 (1991).

In order to provide the flexibility needed to act quickly, and in recognition of the fact that, for example, contacts of suspected cases may not need to be detained in a medical facility, the amendments allow the Commissioner, as opposed to the Board, to designate an appropriate

medical facility, premises or other appropriate facility as the location where individuals may be detained. The amendments require, as appropriate, that the individual have his or her medical condition and needs assessed on a regular basis and be detained in a manner consistent with recognized isolation and infection control principles.

### III. LEGAL CONSIDERATIONS ATTENDANT TO DETENTION:

It is well recognized that the main business of safeguarding the public health is done by local boards of health. Grossman v. Baumgartner, 17 N.Y.2d 345, 218 N.E.2d 259, 271 N.Y.S.2d 195 (1966). In the seminal United States Supreme Court decision Jacobson v. Massachusetts, which upheld the constitutionality of a regulation enacted by the board of health providing for mandatory smallpox vaccination, the Court states, “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.” 197 U.S. 11, 26 (1905).

The Department adopted these amendments, appreciating that civil commitment is a deprivation of liberty requiring due process protection. Addington v. Texas, 441 U.S. 418, (1979). Courts have recognized that the same procedural safeguards provided, for example, in a criminal trial are not required when imposing a quarantine to protect the public against a highly communicable disease. Morales v. Turman, 562 F.2d 993 (1977). “[D]ue process is flexible and calls for such procedures and protections as the situation demands.” Morrissey v. Brewer, 408 U.S. 471-481 (1972).

“The extent of the due process required depends on the nature and duration of the restraint.” Lawrence O. Gostin, Public Health Theory and Practice in the Constitutional Design, 11 Health Matrix: Journal of Law - Medicine 265, 309 (2001). In considering the due process protections which are constitutionally required as a result of the proposed amendments, the Department considered and weighed the following:

(1) The private interest affected by the governmental action; (2) The risk of an erroneous deprivation of these interests through the procedures used, as well as the probable value, if any, of added or substitute procedural requirements; and (3) the government’s interest and the fiscal and administrative burdens that the additional or substitute procedural requirement would involve. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Accordingly, the Department has amended section 11.55 to add many procedural safeguards that comply with the due process requirements of the Constitution. For example, individuals who are detained for a period of less than three business days are provided with an opportunity to be heard and to have their individual circumstances assessed. Those detained for a longer period may require the Department to seek a court order within three business days. The Department then must obtain a court order within sixty days, even if the detained individual has not requested release. This does not mean that an individual would necessarily be detained for such periods. Amended subdivision 11.55(c) specifies the medical and epidemiologic circumstances under which an individual must be released.

Notice of the detainee's rights is provided to each detainee in writing. For individuals detained for more than three (3) business days, this includes the right to be represented by an attorney provided by the City of New York

These procedural safeguards are similar to those applicable to the detention of non-adherent tuberculosis patients, found in section 11.47 of the Health Code, which Section has been upheld by the courts. See City of New York v. Doe, 205 A.D. 2d 469, 614 N.Y.S.2d 8 (1994); See also, City of New York v. Antoinette R., 630 N.Y.S.2d 1008 (1995).

#### IV. POST PUBLICATION CHANGES:

After publication of the proposed rule, the Department suddenly had to react to cases of "suspect" and "probable" severe acute respiratory syndrome ("SARS"), a new emerging communicable disease. In an effort to prevent the transmission of SARS, the Department ordered one suspect case of SARS to be detained in a health facility and another person was ordered to remain at home. This experience underscored the need to clarify that not all of the same due process protections are required when an order to a person to remain at home is not being physically enforced, e.g., by guards outside the home. A new subdivision (l) was added which provides that when a person is ordered to remain at home, or at some other premises of his or her choosing which is acceptable to the Department, and the order is not being physically enforced, the Department is required to offer such a person an opportunity to be heard by the Department. The new subdivision also makes it clear that the other due process protections that are required for Section 11.55 custodial detention orders are not applicable to these non-custodial orders.

An additional change was made which eliminates the requirement that there be a separate statement of rights issued to a person who is served with an order of detention. The initial proposal to amend Section 11.55 already required the Department to incorporate within each individual order of detention a statement of the rights of any person detained. The Department determined, based on its experience in issuing similar orders, that the requirement for a separate statement of rights was redundant and served no useful purpose.

#### STATEMENT PURSUANT TO SECTION 1042- REGULATORY AGENDA

This proposal was not included in the Regulatory Agenda because it is the result of recent analysis by the Department as to the need to strengthen existing provisions to address the possibility of new, emerging diseases or of a terrorist act.

The proposal is as follows:

Note- matter in brackets [] to be deleted  
matter underlined is new

RESOLVED, that subdivision (i) of Section 11.01 of the New York City Health Code as last amended by resolution adopted on the 17th day May, 1995, be and the same hereby is amended, to be printed together with explanatory notes, to read as follows:

- (i) Non-household contact means a person who has been or may have been in such close, prolonged, or repeated association with a case or carrier as, in the opinion of the Department, to involve a risk that such person may become a case or carrier.

NOTES: Subdivision (i) of Section 11.01 is amended to specify that a contact includes a person who may have been in close association with a case or carrier.

RESOLVED FURTHER, that Section 11.55 of the Health Code, as adopted on March 23, 1959, be and the same hereby is amended, to be printed together with explanatory notes, to read as follows:

11.55 Removal and detention of cases, contacts and carriers who are or may be [endangering] a danger to public health. (a) Upon determining by clear and convincing evidence that the health of others is or may be endangered by a case, contact or carrier, or suspected case, contact or carrier of [communicable disease] smallpox, pneumonic plague, or any other communicable disease that, in the opinion of the Commissioner, may be disseminated or transmitted from person to person, and may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality, the Commissioner may order his or her removal [to] and/or detention. Such person shall be detained in a [hospital] medical facility, premises, or other appropriate facility designated by the [Board] Commissioner and complying with subdivision (d) of this section.

(b) [The chief medical officer of the hospital to which a person is removed by] A person who is removed or detained by order of the Commissioner pursuant to subdivision (a) of this section shall be detained [such person for the period and in the manner prescribed in this article for the particular disease, and in the absence of specific provisions, then] for such period and in such manner as the Department may direct in accordance with this section. [A person who is detained may apply to the Commissioner for his discharge from the hospital. If his application is denied, he may appeal to the Board pursuant to Section 5.21.].

(c) Notwithstanding any inconsistent provision of this section:

(1) A confirmed case or a carrier of a disease set forth in subdivision (a) who is detained pursuant to this section shall not continue to be detained after the Department determines that such person is not infectious.

(2) A suspected case or suspected carrier of a disease set forth in subdivision (a) who is detained pursuant to this section shall not continue to be detained after the Department determines, with the exercise of due diligence, that such person is not infected with or has not been exposed to such a disease, or if infected with or exposed to such a disease, no longer is or will become infectious.

(3) A person who is detained pursuant to this section as a contact of a confirmed case or a carrier of a disease set forth in subdivision (a) shall not continue to be detained after the Department determines that such contact no longer presents a potential danger to the health of others.

(4) A person who is detained pursuant to this section as a contact of a suspected case of a disease set forth in subdivision (a) shall not continue to be detained: (i) after the Department determines, with the exercise of due diligence, that the suspected case was not infected with such a disease, or was not infectious at the time the contact was exposed to such individual; or (ii) after the

Department determines that the contact no longer presents a potential danger to the health of others.

(d) A person who is detained pursuant to subdivision (a) shall as is appropriate to the circumstances: (i) have his or her medical condition and needs assessed on a regular basis, and (ii) be detained in a manner that is consistent with recognized isolation and infection control principles in order to minimize the likelihood of transmission of infection to such person and to others.

(e) When a person is ordered to be detained pursuant to subdivision (a) of this section for a period not exceeding three (3) business days, such person shall, upon request, be afforded an opportunity to be heard. An individualized assessment of the person's circumstances and/or behavior constituting the basis for the issuance of the detention order shall be undertaken in determining whether to continue the detention. The Commissioner's order for such detention shall include the authority under which the order is issued, advise the person being detained that he or she has the right to request release from detention, and include instructions on how such request shall be made. If a person detained pursuant to subdivision (a) and this subdivision needs to be detained beyond three (3) business days, he or she shall be served with an additional Commissioner's order which complies with the requirements of subdivision (f) of this section.

(f) When a person is ordered to be detained pursuant to subdivision (a) of this section for a period exceeding three (3) business days, and such person requests release, the Commissioner shall make an application for a court order authorizing such detention within three (3) business days after such request by the end of the first business day following such Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After any such request for release, detention shall not continue for more than five (5) business days in the

absence of a court order authorizing detention. Notwithstanding the foregoing provisions, in no event shall any person be detained for more than sixty (60) days without a court order authorizing such detention. The Commissioner shall seek further court review of such detention within ninety (90) days following the initial court order authorizing detention and thereafter within ninety (90) days of each subsequent court review. In any court proceeding to enforce a Commissioner's order for the removal or detention of a person issued pursuant to this subdivision or for review of the continued detention of a person, the Commissioner shall prove the particularized circumstances constituting the necessity for such detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of such person, counsel shall be provided.

(g) (1) An order of the Commissioner pursuant to subdivisions (a) and (f) of this section shall set forth:

(i) the legal authority under which the order is issued, including the particular sections of this article or other law or regulation; and

(ii) an individualized assessment of the person's circumstances and/or behavior constituting the basis for the issuance of such orders; and

(iii) the less restrictive alternatives that were attempted and were unsuccessful and/or the less restrictive alternatives that were considered and rejected, and the reasons such alternatives were rejected.

(2) In addition, the order shall:

(i) include the purpose of the detention;

(ii) advise the person being detained that he or she has the right to request release from detention by contacting a person designated on the Commissioner's order at a telephone number stated on

such order, and that the detention shall not continue for more than five (5) business days after such request in the absence of a court order authorizing such detention;

(iii) advise the person being detained that, whether or not he or she requests release from detention, the Commissioner must obtain a court order authorizing detention within sixty (60) days following the commencement of detention and thereafter must further seek court review of the detention within ninety (90) days of such court order and within ninety (90) days of each subsequent court review;

(iv) advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, that such counsel will be notified that the person has requested legal representation;

(v) advise the person being detained that he or she may supply the addresses and/or telephone numbers of friends and/or relatives to receive notification of the person's detention, and that the Department shall, at the patient's request, provide notice to a reasonable number of such people that the person is being detained.

[c](h) A person who is detained in a [hospital] medical facility, premises, or other appropriate facility shall not conduct himself or herself in a disorderly manner, and shall not leave or attempt to leave [the hospital] such facility or premises until he or she is discharged pursuant to this section.

(i) Where necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(j) The provisions of this section shall not be construed to permit or require the forcible administration of any medication without a prior court order.

(k) The provisions of this section shall not apply to the issuance of orders pursuant to the provisions of section 11.47 of this article.

(l) In addition to the removal or detention orders referred to in subdivision (a) of this section, the Commissioner may, in his or her discretion, issue and seek enforcement of any other orders that he or she determines are necessary or appropriate to prevent dissemination or transmission of disease, including but not limited to, orders requiring any person or persons who are not in the custody of the Department to remain at home or at a premises of such person's choice that is acceptable to the Department and under such conditions and for such period as will prevent dissemination or transmission of the disease. Such person or persons shall, upon request, be afforded an opportunity to be heard, but the provisions of subdivisions (a) through (k) shall not otherwise apply.

NOTES: Subdivisions (a) and (b) were amended, subdivision (c) was amended and relettered as subdivision (h), and new subdivisions (c) through (g) and (i) through (l) were added by resolution adopted on June 11, 2003, to strengthen the provisions governing the detention of a confirmed case, a contact or a carrier, or by a suspected case or contact of a suspected case of smallpox, pneumonic plague, or any other communicable disease that, in the opinion of the Commissioner, may be disseminated or transmitted from person to person, and may pose an imminent and significant threat to the public health resulting in severe morbidity or high mortality. Subdivision (l) was added to clarify the Commissioner's power to issue and seek enforcement of orders, other than orders referred to in subdivision (a), to control the spread of disease, including non-custodial orders requiring a person or persons to remain at home or other mutually agreed upon premises. The new subdivision also clarifies that the other provisions of the section do not apply to such non-custodial orders.